UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MARTHA KINARD, Regional Director of the Sixteenth Region of the National Labor Relations Board, for and on Behalf of the NATIONAL LABOR RELATIONS BOARD	§	
Petitioner,	§	**Civil Action No. 4:16-cv-00952-O**
vs.	§	
DISH NETWORK CORPORATION	§	
Respondent.	§	

BRIEF OF *AMICUS CURIAE* COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO IN SUPPORT OF PETITIONER'S REQUEST FOR INJUNCTIVE RELIEF

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COMES NOW *Amicus Curiae* Communications Workers of America, AFL-CIO ("Amicus") and pursuant to Local Rule 7.2(b) of the Local Civil Rules of the United States District Court for the Northern District of Texas and files this brief in support of injunctive relief sought by Petitioner Martha Kinard ("Petitioner"), Regional Director of the Sixteenth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board under Section 10(j), 29 U.S.C. § 160(j), of the National Labor Relations Act ("the Act") to restore the status quo upset by the unlawful conduct of Respondent Dish Network ("Respondent"), and would respectfully show the Court the following:

I. Standard for 10(j) Injunctive Relief

Section 10(j) of the Act authorizes a United States District Court to grant temporary injunctions pending the Nation Labor Relations Board's resolution of unfair labor practice proceedings as interim relief to prohibit an employer from accomplishing an unlawful objective

before a final Board order is rendered. *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1188 (5th Cir. 1975). A district court considers two issues in determining the appropriateness of 10(j) relief: (1) whether there is "reasonable cause to believe" that a respondent has violated the Act and (2) whether temporary injunctive relief is "just and proper." *McKinney v. Creative Vision Res.*,783 F.3d 293, 296-97 (5th Cir. 2015); *LLC, Overstreet v. El Paso Disposal, LP*, 625 F.3d 844, 850 (5th Cir. 2011); *Freight Carriers*, 515 F.2d at 1188-1189. In addition to the arguments raised by Petitioner, Amicus sets forth the following arguments in support of Petitioner's 10(j) petition.

a. *Reasonable cause to believe Respondent violated the Act*

A district court does not reach the merits of a charge in determining if there is reasonable cause to believe the employer violated the Act. *Freight Carriers* at 1191. A district court's role in evaluating whether there is reasonable cause to find a violation of the Act in a proceeding under Section 10(j) only requires the court to determine if the Regional Director's theories of the case are "not insubstantial and frivolous." *Id.* at 1189. A district court should defer to the Regional Director's legal theories of the case, even if they have not been adopted by the Board or are otherwise novel. *Boire v. International Brotherhood of Teamsters*, 479 F.2d 778, 789-792 (5th Cir. 1973). The factual burden of the Regional Director can be sustained by "enough evidence . . . to permit a rational fact finder, considering the evidence in the light most favorable to the Board, to rule in favor of the Board." *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d 367, 371 (11th Cir. 1992); see also *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1031 (2d Cir. 1980). A district court does not, and should not, resolve factual disputes during a 10(j) proceeding. *Arlook*, 952 F.2d at 372-373. The facts of this case establish a reasonable cause to conclude that Respondent violated the Act and an injunction under Section 10(j) is warranted.

1. The evidence of Respondent's retaliatory intent provides additional reasonable cause

In additions to the reasons advance by Petitioner (Docket, Doc. 7, pp. 21-47), Amicus would respectfully show the court that a violation of the Act, specifically 29 U.S.C. § 158(a)(3), Section 8(a)(3), is also supported by evidence proving Respondent intended to impose a wage rate lower than what it paid its other Dallas-Fort Worth area employees because Respondent wanted employees to quit because it sought to penalize bargaining unit employees for the cost Respondent had incurred as a result of North Richland Hills and Farmers Branch selecting Amicus as their representative for the purpose of collective bargaining. This argument is consistent with the theory advanced by the Board in *American Baptist Homes*, 364 NLRB No. 13 (2016). In *American Baptist*, the Board held

> As stated above, the Respondent's counsel told the Union's attorney that the Respondent planned to hire permanent replacements because it wanted "to teach the strikers and the Union a lesson." This statement evinces an intent to punish the striking employees for their protected conduct, and plainly reveals a retaliatory motive prohibited by the Act. *American Baptist*, 364 NLRB at slip 7.

The Board then proceeded in *American Baptist* to state "that actions to prevent employees from engaging in protected activity are generally unlawful and that 'the suppression of future protected activity is exactly what lies at the heart of most unlawful retaliation against past protected activity.'"). *American Baptist* at slip 7 (citing *Parexel International*, 356 NLRB 516, 519 (2011)). Such conduct is exactly what Respondent has undertaken through its wage cuts.

Respondent's December 18, 2014 last best and final offer on wages for technicians in North Richland Hills and Farmers Branch was as follows: technicians holding the Field Service Specialists ("FSS") I title would earn $13.00 per hour, technicians employed as an FSS II would earn $14.00 per hour, technicians in the FSS III job title would earn $16.00 per hour, and technicians employed in the FSS IV job title would earn $17.00 per hour. (Docket, Doc. 8-2, App.

1381, 1413). By comparison to what technicians at the non-union locations in the Dallas-Fort Worth were making at the approximate time of the final offer, Respondent's wage proposal for the FSS I job title proposed $1.02 per hour to $2.70 per hour lower than what it paid at its other Dallas-Fort Worth are facilities; for the FSS II job title it proposed $2.98 per hour to $3.89 per hour lower than what it paid at its other Dallas-Fort Worth are facilities; for the FSS III job title it proposed $2.25 per hour to $3.16 per hour lower than what it paid at its other Dallas-Fort Worth are facilities; and for technicians employed in the FSS IV job title it proposed $3.88 per hour to $4.75 per hour lower than what it paid at its other Dallas-Fort Worth are facilities. (Compare Docket, Doc. 8-2, App. 1381 to Doc. 8-3, App. 1906). The wage ultimately imposed by Respondent resulted in an approximate $0.59 to $5.26 cut per hour for FSS I technicians, an $8.87 to $14.04 cut per hour for FSS II technicians, a $14.74 to $11.95 cut for FSS III technicians, and an $8.60 to $11.63 cut for FSS IV technicians. (Id.). Additionally, Respondent estimated it would save approximately $2,100,000.00 by not offering any incentive plan to North Richland Hills and Farmers Branch technicians. (Id., Doc. 8-3, App. 1578). The disparity between the wages proposed for union-represented facilities and the non-union locations and the severity of the cuts establishes the retaliatory nature of the wage cuts. When coupled with the direct evidence of animus in the form of the text message by Hanns Obere and the statements by Respondent at the bargaining table, the wage cuts support finding a reasonable belief that Respondent violated the Act.

2. <u>The Obere text is evidence of retaliatory intent</u>

This case features two striking species of evidence that support the theory Respondent intended to retaliate against bargaining unit employees through the imposition of the working unconscionable wage cuts. The first piece of such evidence of animus is the text message that

Field Service Manager Hanns Obere sent bargaining unit employee Kenneth Daniel on April 6, 2016, which reads as follows

> The union is gone
> Techs will be on affixed [sic] hourly rates, no Pi
> Level 4 will earn 17 dollars an hour
> They will earn like the rest of the company if they transfer to other offices which they encourage
> They have QPC till [sic] the 23rd
> The two offices are gradually closing
> We will be dispatched to other offices or a new one will be started
> They would rather have the techs quit en mass [sic]
> Seatbelt for a bumpy ride
> Call me when you have a minute (Docket, Doc. 8-2, App. 1454-56).

Obere's text is direct evidence of Respondent's intent to force employees to quit, and therefore constructively discharge them is corroborated by the statement Obere provided to Respondent on April 12, 2016 wherein Obere stated that Regional Manager Thomas Nicholas told Obere it would be preferable "if the technicians resigned on their own." (Id., Doc. 8-1, App. 206; Doc. 8-3, App. 1892). Obere's statement that Amicus "is gone" coupled with its premeditated intent that employees will quit in response to the wage cuts is evidence of retaliatory intent in violation of 29 U.S.C.158(a)(3), Section 8(a)(3) of the National Labor Relations Act.

3. Respondent's statements at the bargaining table are admissible and relevant to establishing Respondent's retaliatory intent

Additional evidence that Respondent intended to retaliate against bargaining unit employees is found in the statements that it made to Amicus at the bargaining table. Contrary to the allusions made by Respondent in its Sur-Reply (Docket, Doc. 24-2, p. 2-3), evidence of events outside the limitations period provided in 29 U.S.C. § 160(b), Section 10(b) of the Act, is relevant

> where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose § 10 (b) ordinarily does not bar such evidentiary use of anterior events. *Int'l Ass'n of Machinists v. NLRB*, 362 U.S. 411, 416 (1960).

The Court's holding as to the admissibility of evidence outside the 10(b) period has been followed by the NLRB, which has held that "evidence of conduct outside the 10(b) period may properly be received as background, and considered as part of the analysis of the legality of the conduct within the 10(b) period." *Fruehauf Trailer Services*, 335 NLRB 393, 405 (2001). Likewise, arguments Respondent makes concerning a dismissed NLRB charge in its brief in opposition (Docket, Doc. 19, p. 34, n. 12) are also unavailing because the decision of a Regional Director of the NLRB not to issue a complaint is "probative of almost nothing." *Black v. Ryder/P.I.E. Nationwide*, 15 F.3d 573, 587 (6th Cir. 1994); see also *Edna H. Pagel, Inc. v. Teamsters Local Union 595*, 667 F.2d 1275, 1280 (9th Cir.1982). Amicus submits that the following evidence is relevant because it corroborates the sentiments expressed in the Obere text and explicates the motive for Respondent's conduct.

The statements by Respondent's lead negotiator, George Basara, to Amicus's negotiator, Donna Bentley, about the costs that Respondent incurred due to the organizing of Farmers Branch and North Richland Hills establishes Respondent's intent to retaliate against employees because of their concerted activities, namely support and affiliation with Amicus.

As Amicus's August 16, 2012 notes reflect Basara stating

> But you've already taken 2 things to the NLRB and that's been costly. We've probably spent easily 6 figures on attorney fees, time and effort in dealing with the unfair labor practices charges and termination cases. I find it to be a fascinating strategy that you come here and say let's have a contract but while we're here we're going to attack you in 30 different ways. Then you say trust us in arbitration--we only take things we need to take. It's hard for me to believe you. Actions are 'play ball or we're going to file charge after charge'. (Docket, Doc. 8-1, App. 320; Doc. 8-2, App. 1468).

Basara made this comment to Bentley again in October 2012 during a discussion on wages and arbitration. According to the Amicus's notes, Basara and Bentley had the following exchange that

is evidence of Respondent's intent to punish the bargaining unit for prior Board proceedings, which put another way equates to teaching the employees not only the futility of the Act, but the costs of exercising those rights

> DB: On wages, I left here thinking that based on this proposal and your comment yesterday, because these two groups are represented by the union, the company's position is that they should make less money than the other 7000 technicians in the company.
>
> GB: And your position is that they should make more. You phrase it because they're represented. That's only true in part. Think about the cost the company's incurred so far dealing with the representation. And the cost the company going forward dealing with the representation. When you say they're being paid less because they're being represented, they're being paid less because the cost of being represented are greater than the cost of non-representation. (Id., Doc. 8-2, App. 1486).

Basara continued on this subject by stating

> So when you say you're paying them less because their represented, I can tell you this. This company has probably paid half a million dollars in defending frivolous charges by you guys. And everyone of them. I didn't lie. So you ask is it going to be less? Yes, it's going to be less. So I'm no (sic.) lying to you about that either. (Id., Doc. 8-1, App. 319; Doc. 8-2, App. 1490).

Basara concluded the discussion by stating, in response to a question about those expenses being incurred as a result of bargaining, "You think you can just come in and say well I cost you half a million dollars and give you the same thing you're giving everybody else? Would you?" (Id., Doc. 8-2, App. 1490).

Basara returned to this point almost one year later during the August 27, 2013 bargaining session. As the Amicus's notes for this session indicate, Basara stated in regards to who has the power vis-à-vis Amicus and Respondent,

> Yes we do on this side of the table. So we can drive as hard a bargain as we want to drive. Nothing unlawful about it. You can try and claim it is. But it's not. And you seem to what to also not recognize and I know it wasn't you're doing but the cost that has been accrued to date to be honest with you by the foolishness your legal console. I realize it's not your responsibility but it's a lot of money for nothing

> I mean a lot of money for nothing and that was really expensive to deal with and it was unreasonable he was appealing cases that shouldn't be appealed it was observed so it's very costly I mean we are in 6 figures easy and you allowed him to do it even after I tried to tell you to stop him and he still did it. (Id., Doc. 8-2, App. 1497).

This theme was revisited during the administrative hearing when Basara testified

> We also had other issues on the table, but at this point, we had also spent countless -- I mean, I can't even imagine, a hundred thousand was spent given all of the charges and everything else that was in this case, and so we're going to spend all of this money, right, and now in the end, "Why didn't you just offer Pi?" Well, that wasn't my strategy. (Id., Doc. 8-2, App. 1150).

Respondent's motive to punish bargaining unit employees for the costs it incurred by imposing wage rates below those paid in the Dallas-Fort Worth area and denying bargaining unit employees the Pi incentive program is analogous to the unlawful motive to "teach a lesson" that was at issue in *American Baptist*.

Respondent's statements at the bargaining table are evidence of the motive behind it imposing a wage rate below what it pays other area employees and this evidence is relevant to establishing an overall course of retaliatory conduct. Respondent cannot excuse these statements as tough bargaining. These statements are evidence of unequivocal retaliatory intent. This evidence proves beyond a doubt that Respondent sought through its low wage scale to punish employees for selecting a representative for the purpose of collective bargaining and for the costs that representation had imposed on Respondent. Respondent's intent to penalize its employees for the costs it incurred is also an additional basis for finding Respondent's actions to be inherently destructive of employee rights under the Act. Respondent's conduct in imposing this wage rate violated Section 8(a)(3) and supports the issuance of the petitioned-for injunction because of the reasonable cause it provides to believe that Respondent has violated Section 8(a)(3).

b. *Injunctive relief is just and proper in this case*

Injunctive relief is "just and proper" under Section 10(j) if the facts demonstrate that, without such relief, "any final order of the Board will be meaningless or so devoid of force that the remedial purposes of the Act will be frustrated." *Freight Carriers*, 515 F.2d at 1192; *Teamsters*, 479 F.2d at 788 (interim relief warranted where, absent such relief, "Board processes would be of little avail" to the affected employees). The United States Court of Appeals for the Fifth Circuit thus frames the question of just and proper in terms of necessity; an injunction must be necessary so that the Board's final remedy is effective. *Freight Carriers*, 515 F.2d at 1193. The status quo to be preserved by such an injunction is "the last uncontested status which preceded the pending controversy." *Freight Carrier* at 1194 (quoting *Minnesota Mining & Mfg. Co.*, 385 F.2d 265, 273 (8th Cir. 1967)).

1. Respondent's misdeeds cannot be remedied effectively absent an injunction

The facts of this case satisfy the requirement "that the unfair labor practice . . . has caused identifiable and substantial harms that are unlikely to be remedied effectively by a final administrative order from the NLRB." *Creative Vision* at 299. Specifically, Respondent's retaliatory actions against bargaining unit employees have sought to make them pay for the costs Respondent has incurred by cutting their wages. As in *American Baptist*, Respondent is seeking to teach these employees a lesson that their support for Amicus will come at a cost. It is unlawful for employees to bear this cost and continuing to do so will invariably lead to further employees leaving the bargaining units.

The Obere text demonstrates Respondent's intent to rid itself of its employees represented by Amicus and the means by which it has chosen to do so is by creating intolerable working conditions under the pretext of a bargaining impasse. This unlawful conduct deprives bargaining

unit employees of the benefits of the representation they selected six years ago and drives employees from the bargaining units. This in turn supports the "identifiable and substantial harm" that requires preliminary injunctive relief because "any final order of the NLRB would be meaningless and the remedial purposes of the Act will be frustrated without an injunction to preserve the status quo." *El Paso Disposal*, 625 F.3d at 851. Such an injunction would also satisfy the Fifth Circuit's requirement that an injunction clearly be "affirmatively more effective than a final decision from the NLRB" because the longer the intolerable wage cuts persist the more likely it is that a final order from the Board would be moot because there would be no bargaining unit employee left at the facilities to benefit from such a remedy. *Creative Vision* at 300-01 (citing *Freight Carriers* at 1192).

The irreparable harm in this case, as argued by the Petitioner, is primarily in the form of the erosion of the bargaining unit. (Docket, Doc. 7, p. 48). However, to the extent that diminished wages are an issue in the case, the existence of financial injury in a case does not frustrate 10(j) relief. In *Teamsters*, the court issued an injunction because the labor dispute at issue in that case "quite clearly would result in severe financial loss to the Company." *Teamsters*, 479 F.2d at 788. This case presents the employee analog to that scenario. Here, employees have had their wages drastically reduced through the unlawful wage cuts and some bargaining unit employees have been forced to leave the units to maintain their respective livelihoods. The threat of analogous outcome to the employer in *Teamsters* led the court to issue an injunction and should likewise not be countenanced in the circumstances facing the bargaining unit employees in Farmers Branch and North Richland Hills. An injunction should therefore be issued to restore the status quo

Restoration of the status quo is an integral part of a 10(j) injunction and is distinct from ordering Respondent to accept a particular bargaining term. In *El Paso Disposal*, the Fifth Circuit

upheld the issuance of an injunction to reinstate discharged strikers, but modified the part of the injunction that penalized the employer for not "acceding" to the labor organization's dues check-off provision. *El Paso Disposal* at 856. The equitable function of a 10(j) injunction is to the return the parties to the position prior to commission of the unfair labor practices that pose catastrophic harm to the bargaining units. In this case, the status quo can only be returned to by restoring working conditions, including wages, to their status prior to Respondent's unlawful unilateral changes that began on April 23, 2016. This restoration should reach not only those who have remained, but also those constructively discharged, analogous to the reinstatement of the strikers in *El Paso Disposal*. The bargaining unit employees who were constructively discharged should therefore be reinstated by operation of a 10(j) injunction.

2. Respondent's retaliatory intent is egregious and exceptional for purposes of 10(j)

Injunctive relief is just and proper because Respondent's wage cuts resulted in the decimation of the bargaining unit as clearly contemplated by the statements at the bargaining table and those of the Obere text. Respondent's retaliatory intent as outlined above satisfies the Fifth Circuit's requirement that the conduct at issue is not simply a violation of the Act, but is also egregious and exceptional. *Creative Vision* at 302. Respondent, as proved by the Obere text, sought to compel its employees to quit by cutting their wages. The reason Respondent sought the wage cut, as proved by its statements in bargaining and Basara's testimony at the hearing, was because of its desire to recover the costs imposed by the employees' representation by Amicus. These facts satisfy the egregious and exceptional nature of Respondent's misconduct and support the issuance of an injunction.

3. Respondent's refusal to meet and bargain over proposals is also egregious and exceptional

Respondent manufactured its pretextual impasse by refusing to honor a commitment to meet and bargain in December 2014 and refusing to meet with Amicus throughout the winter and spring of 2016 despite Amicus's numerous demands to bargain. Respondent's artificial December 2014 deadline to bargain was driven by the departure of Basara and had nothing to do with bargaining itself. Respondent's continued refusal to meet in 2016 is likewise egregious because it is predicated on the incorrect assumption of a continued impasse and fails to grasp that even if an impasse had existed, the passage of time broke such an impasse.

Amicus would show the Court that contrary to the assertions of Respondent, there can be no impasse predicated on the correspondence between Respondent and Amicus in December 2014 because Amicus and Respondent had not agreed to bargain by correspondence on December 9, 2014 when Amicus provided Respondent with proposals is advance of a bargaining session that was to be rescheduled from December 8-9, 2014 due to a death in the family of its lead negotiator, Sylvia Ramos. (Docket, Doc. 8-1, App. 475-76; Doc. 8-2, App. 1418, App. 1457). Amicus offered dates in January and February 2015. Respondent through its lead negotiator, George Basara, responded to this correspondence by stating that he had non-refundable travel arrangements and that "If you do not meet with us as scheduled, and you also refuse to provide a proposal in writing, we will consider the bargaining to be at impasse." (Id., Doc. 8-2, App. 1418). Ramos responded to Basara later on December 4th by stating Amicus would prepare proposals to Respondent in response to its November 2014 proposal, but that in doing so it would not waive its right "to meet with you and discuss face-to-face your response." (Id., App. 1423). Ramos also stated she would consider any dates offered by Respondent in addition to those already proposed by Amicus. (Id.). Basara responded on December 5th by stating "Please forward your proposals." (Id., App. 1421).

Amicus forwarded its proposals to Respondent on December 9, 2014 and noted that Amicus continued "to stand firmly on the need to bargain over our proposals." (Id., App. 1362). Respondent responded on December 9th by offering to meet the following week to bargain. (Id., Doc. 8-3, App. 1587). Ramos responded on December 11th that she was not available for the remainder of December, but would be willing to schedule bargaining during the first two weeks of January 2015. (Id., Doc. 8-2, App. 1427). Basara responded later on December 11th by asking Ramos if she was saying that she did "not have a single day to meet this entire month?" (Id., App. 1427). Ramos responded on December 12th by reiterating she would be willing to meet during the first two weeks of January and that the Amicus had offered other dates later in January and February 2015. (Id., App. 1429).

It was only at this point that Respondent unilaterally prepared a written response on December 18, 2014. Prior to Respondent's December 18th correspondence to Amicus, Respondent understood Amicus wished to bargain over its December 9th proposals and agreed to do so. Respondent's action of December 18th was driven more by the imminent departure of Basara as its bargaining representative than by a sincere belief that the parties were at impasse. Therefore, in addition to the grounds raised by Petitioner, these facts further support the conclusion that no impasse existed as of December 2014.

Respondent's egregious conduct resumed in 2016 when its new bargaining representative, Brian Balonick, contacted Amicus on January 8, 2016 and stated that Respondent's "November 19, 2014 letter to you presented DISH's last, best and final offer." (Id., App. 1389). Respondent further indicated in regards to that offer that the Amicus was "unwilling to take it to your bargaining unit." (Id.). Respondent closed that letter by stating since the "November 19th" proposal was Respondent's last, best and final offer, it did not appear as if "further bargaining

would be productive." (Id.). Ramos responded to Balonick on January 13th and reiterated that Amicus had reserved the right to bargain over its December 9th proposals and requested Respondent provide bargaining dates. (Id., App. 1391, 1393).

Balonick responded on February 2, 2016 that he viewed Ramos's letter of January 13th as evidence that "the parties have remained rigid in their respective positions." (Id., App. 1411). Ramos responded on February 3rd by requesting bargaining dates. (Id., App. 1431). Balonick responded on April 4, 2016 by informing Ramos that Respondent would be implementing its December 2014 last, best and final offer. (Id., App. 1413). Ramos responded on April 12th by again demanding bargaining dates to discuss the Amicus's last proposals. (Id., App. 1436). Basara's April 19th response restated the assessment of the bargaining contained in his prior correspondence but also noted that "the Union refuses to vote on" Respondent's last, best and final offer of December 2014. (Id., App. 1445).

Balonick testified at the hearing that the strategy animating his dealing with Ramos and Amicus during the winter and spring of 2016 was that he wanted to test them "to see how serious they were about trying to reach an agreement." (Id., Doc. 8-1, App. 116). Balonick went on to testify

> So I wrote that letter in January of '16 inviting them to show us something that -- anything that they were interested in a contract where it wasn't QPC. I wrote more than one letter, I know one letter was shown to me. I wrote three letters, I believe, practically begging them to show me anything, something, so that -- you know, if they showed me a new proposal, I'd be willing to meet with them. (Id., App. 116-17).

Balonick dismissed out-of-hand Ramos's requests to meet and bargain. (Id., App. 117). This conduct is egregious because Amicus and respondent had agreed to bargain on December 8-9, 2014 and that session was cancelled only because of a death in the family of Amicus's negotiator. Respondent was still willing to meet with Amicus after it received the proposals on

December 9, 2014. Respondent only refused to bargain once it learned that Amicus was unavailable in December 2014 and the only relevance of that date is the imminent departure of Basara as Respondent's negotiator at the end of December 2014. This fact renders Respondent's impasse based on 2014 pretextual in nature and an egregious violation of the duty to bargain established under the Act.

Respondent's conduct in 2016 is likewise egregious because it refused to bargain with Amicus despite multiple demands from amicus to bargain. An employer unlawfully refuses to bargain when it refuses to sit across the table from a labor union and insists on remote bargaining. *Alle Arecibo Corp.*, 264 NLRB 1267 (1982); *Duro Fittings Co.*, 121 NLRB 377 (1958). In this case, beginning with Ramos's demand to bargain in her January 13, 2016 letter to Balonick, Respondent has refused to bargain with Amicus, despite Amicus's repeated statements that it was willing to meet and bargain. Amicus's willingness to meet further undermines Respondent's claim that the parties were at impasse because a labor union's assertion that it is willing to continue bargaining is sufficient to defeat impasse. *Ead Motors E. Air Services*, 346 NLRB 1060, 1064 (2006); *Newcor Bay City Division*, 345 NLRB 1229, 1239 (2005).

Further, Respondent ignored the fact that the passage of time can break an impasse if, assuming arguendo, an impasse existed in 2014. The passage of one year "was clearly a sufficient period for cooling off and taking a second look at earlier positions." *Airflow Research & Manufacturing Co.*, 320 NLRB 861, 862 (1996) (*citing Gulf States Mfg., Inc. v. NLRB*, 704 F.2d 1390, 1399 (5th Cir. 1983)). Here, the passage of time from December 2014 to January 2016 was sufficient to break any impasse that may have existed in 2014. Therefore, if Balonick wished to test Amicus, he should have done so at the bargaining table and not through email because by the time of the unilateral changes in April 2016, including the wage cuts, any impasse in December

2014 had ceased. Respondent's insistence to the contrary is egregious and extreme and warrants 10(j) relief to vindicate the principle that parties in a collective bargaining relationship must bargain before impasse can be reached.

II. Conclusion and Prayer

WHEREFORE, PREMISES CONSIDERED, Amicus Curiae Communications Workers of America, AFL-CIO prays the Court grant the injunctive relief sought by Petitioner Martha Kinard against Respondent Dish Network Corporation for all of the reasons argued in her briefing and as supported by the arguments above, pursuant to 29 U.S.C. § 160(j), Section 10(j) of the National Labor Relations Act, as well as any other relief Petitioner is entitled to at law or in equity.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing document was served on Counsel for Plaintiff/Counter-Defendant on this 10th day of November 2016 as follows by the Court's electronic filing system:

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